No. 16-1017	
Title:	**Laith G. Cox, Petitioner** **v.** **United States**
Docketed:	February 24, 2017
Lower Ct:	United States Court of Appeals for the Armed Forces
Case Numbers:	(16-0635/AR)
Decision Date:	January 17, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Feb 21 2017	Petition for a writ of certiorari filed. (Response due March 27, 2017)
Mar 22 2017	Order extending time to file response to petition to and including April 26, 2017.
Apr 19 2017	Order further extending time to file response to petition to and including May 15, 2017.
May 15 2017	Brief of respondent United States in opposition filed.
May 19 2017	Reply of petitioner Laith G. Cox filed. VIDED.
Sep 06 2017	DISTRIBUTED for Conference of 9/25/2017.
Sep 28 2017	Petition GRANTED, and the petitions for writs of certiorari in Nos. 16-961 and 16-1423 are granted. The cases are consolidated, and a total of one hour is allotted for oral argument. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether this Court has jurisdiction to review the cases in Nos. 16-961 and 16-1017 under 28 U. S. C. § 1259(3).
Nov 07 2017	Joint appendix filed. VIDED. (Statement of costs filed)
Nov 07 2017	Brief of petitioners filed. VIDED.
Nov 14 2017	Brief amicus curiae of Aditya Bamzai in support of neither party filed. VIDED.

Nov 17 2017	SET FOR ARGUMENT ON Tuesday, January 16, 2018. VIDED
Nov 22 2017	CIRCULATED.
Dec 07 2017	Brief of respondent United States filed. VIDED. **Proof of Service** **Main Document**
Dec 14 2017	Motion of Aditya Bamzai for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Dec 18 2017	Record requested from the U.S.C.A for the Armed Forces.
Jan 05 2018	Reply of petitioner Laith G.Cox filed. VIDED. (Distributed) **Main Document** **Certificate of Word Count** **Other** **Proof of Service**
Jan 05 2018	Motion of Professor Aditya Bamzai for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument GRANTED, and the time is divided as follows: 30 minutes for petitioners, 10 minutes for Professor Aditya Bamzai, and 30 minutes for respondent. VIDED
Jan 08 2018	Record received from the U.S.C.A. for the Armed Forces. (2 Boxes). Box 2 of 2 is SEALED.
Jan 10 2018	Letter of respondent United States filed. VIDED. (Distributed) **Main Document**
Jan 16 2018	Argued. For petitioners: Stephen I. Vladeck, Austin, Tex. For Professor Aditya Bamzai as amicus curiae: Aditya Bamzai, Charlottesville, VA. For respondent: Brian H. Fletcher, Assistant to the Solicitor General, Department of Justice, Washington, D. C. VIDED.

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RECORD AND BRIEFS

16-1017

Supreme Court, U.S.
FILED
FEB 21 2017
OFFICE OF THE CLERK

No. 16-____

IN THE

Supreme Court of the United States

LAITH G. COX, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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February 21, 2017

QUESTIONS PRESENTED

Since shortly after the Civil War, federal law has required express authorization from Congress before active-duty military officers may hold a "civil office," including positions that require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii).

After President Obama nominated and the Senate confirmed Lieutenant Colonel Paulette Vance Burton, Colonel Larss G. Celtnieks, Colonel James Wilson Herring, Jr., and Colonel Martin T. Mitchell as judges of the Article I U.S. Court of Military Commission Review (CMCR), all four continued to serve on either the Army or Air Force Court of Criminal Appeals (CCA). The U.S. Court of Appeals for the Armed Forces (CAAF) rejected as moot Petitioners' challenges to these judges' continued service on the CCAs, because the President had not signed the judges' CMCR commissions until after the CCAs had decided the Petitioners' cases on the merits.

The Questions Presented are:

1. Whether the Court of Appeals erred in holding that Petitioners' claims were moot.
2. Whether these judges' service on the CMCR disqualified them from continuing to serve on the CCAs under 10 U.S.C. § 973(b)(2)(A)(ii).
3. Whether the judges' simultaneous service on both the CMCR and the AFCCA violated the Appointments Clause.

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PETITION FOR A WRIT OF CERTIORARI

This Petition raises the same questions as those already presented in *Dalmazzi* v. *United States*, No. 16-961 (U.S. filed Feb. 1, 2017). Like the Petitioner in *Dalmazzi*, each of the six Petitioners here is a servicemember who

(1) was convicted by a court-martial;

(2) appealed their conviction to their service-branch Court of Criminal Appeals (CCA);

(3) had their conviction affirmed (or reconsideration denied) by a CCA panel that included at least one military judge also serving at the time as an "additional judge" of the U.S. Court of Military Commission Review (CMCR);

(4) petitioned for review before the Court of Appeals for the Armed Forces (CAAF), challenging the legality of CMCR judges also sitting on the CCAs; and

(5) had CAAF grant their petition for review.

In *Dalmazzi*, CAAF held that it could not reach the merits of the dual-officeholding issue raised in these cases because the President had not signed Judge Mitchell's commission to serve on the CMCR until after the Air Force CCA had ruled in Dalmazzi's case, and so Dalmazzi's claims were moot. *See United States* v. *Dalmazzi*, 76 M.J. 1, 3 (C.A.A.F. 2016) (per curiam). After that ruling, the Court of Appeals issued a one-sentence order in each of the Petitioners' cases, noting that, "in light of *Dalmazzi*," the grant of review in their case should be vacated, and the petition for review be denied. *See* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.

Petitioners' claims rise and fall with *Dalmazzi*. Therefore, if this Court grants the petition in *Dalmazzi* and vacates or reverses the decision below, it should grant this Petition as well, vacate the decisions below, and remand to the Court of Appeals for further proceedings in light of this Court's disposition in *Dalmazzi*.

OPINIONS BELOW

The Court of Appeals' orders in Petitioners' cases are not yet reported. They are reprinted in the Appendix at Pet. App. 11a, 14a, 51a, 54a, 67a, and 78a. The opinions of the U.S. Air Force and Army Courts of Criminal Appeals in the Petitioners' cases are not reported. They are reprinted in the Appendix at Pet. App. 1a, 12a, 15a, 52a, 55a, and 68a.

JURISDICTION

In each of Petitioners' cases, the Court of Appeals granted a petition for review. *See United States* v. *Cox*, 75 M.J. 457 (C.A.A.F. 2016) (mem.); *United States* v. *Morchinek*, 75 M.J. 463 (C.A.A.F. 2016) (mem.); *United States* v. *Craig*, 75 M.J. 470 (C.A.A.F. 2016) (mem.); *United States* v. *O'Shaughnessy*, 75 M.J. 493 (C.A.A.F. 2016) (mem.); *United States* v. *Miller*, 75 M.J. 495 (C.A.A.F. 2016) (mem.); *United States* v. *Lewis*, No. 16-660 (C.A.A.F. Dec. 19, 2016) (mem.). In *Lewis*, *Morchinek*, and *O'Shaughnessy*, the Court of Appeals issued a final judgment on December 27, 2016. In *Cox*, *Craig*, and *Miller*, the Court of Appeals issued a final judgment on January 17, 2017. This Court therefore has jurisdiction over all six cases under 28 U.S.C. § 1259(3).[1]

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1. As in *Dalmazzi*, in each of the Petitioners' cases, the Court of Appeals' decision vacated the grant of review and purported to

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause provides that the President:

> shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

U.S. CONST. art. II, § 2, cl. 2.

As relevant here, the military dual-officeholding statute provides that:

> Except as otherwise authorized by law, [active-duty military officers] may not hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate.

10 U.S.C. § 973(b)(2)(A)(ii).

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deny the petition. Pet. App. 11a, 14a, 51a, 54a, 67a, 78a. But this Court has appellate jurisdiction over all "[c]ases in which [CAAF] granted a petition for review under section 867(a)(3) of title 10." The Court of Appeals' grant of review in each of Petitioners' cases brings them within the plain meaning of that provision.

STATEMENT OF THE CASE

A. Legal Background

As in *Dalmazzi*, this Petition arises from the continuing service of active-duty military officers as judges on the Air Force and Army Courts of Criminal Appeals (CCAs) after their confirmation as "additional judges" on the U.S. Court of Military Commission Review (CMCR) under 10 U.S.C. § 950f(b)(3). As the Petition in *Dalmazzi* explains at some length, the appointment of such active-duty military officers to the CMCR violates the dual-officeholding ban Congress enacted shortly after the Civil War. *See* Petition for a Writ of Certiorari at 2–8, *Dalmazzi* v. *United States*, No. 16-961 (U.S. filed Feb. 1, 2017); *see also* 10 U.S.C. § 973(b)(2)(A)(ii).[2]

Because the conventional remedy for a violation of § 973(b) is the termination of the appointed officers' military commissions *nunc pro tunc*, all CCA decisions in which those officers participated subsequent to their CMCR appointments—including the CCA rulings in each of the Petitioners' cases—are not just voidable, but void, and cannot be salvaged by the *de facto* officer doctrine. *See* Petition for a Writ of Certiorari at 16 n.10, *Dalmazzi*, No. 16-961 (citing *United States* v. *Jones*, 74 M.J. 95, 97 (C.A.A.F. 2015)).

B. Procedural History

Notwithstanding these concerns, the Court of Appeals for the Armed Forces (CAAF) held in

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2. Moreover, insofar as such dual appointments do not violate § 973(b)(2)(A)(ii), they raise substantial—and potentially insurmountable—problems under the Appointments Clause and Commander-in-Chief Clause of Article II. *See* Petition for a Writ of Certiorari at 13–16, *Dalmazzi*, No. 16-961.

Dalmazzi that, because the President had not signed Colonel Martin T. Mitchell's CMCR commission until after the Air Force CCA (including Judge Mitchell) had ruled in Dalmazzi's case, her challenge to Judge Mitchell's continuing service on the Air Force CCA was moot. *See Dalmazzi*, 76 M.J. at 3. CAAF then applied *Dalmazzi* to each of Petitioners' cases, vacating its prior grants of review and denying each of their petitions. *See* Pet. App. 11a, 14a, 51a, 54a, 67a, and 78a.

Petitioner Laith G. Cox is a Captain in the U.S. Army who was convicted, contrary to his pleas, of a number of serious offenses arising out of sexual misconduct with a 14-year-old girl. He was sentenced to dismissal from the Army and 40 years' confinement. Cox appealed to the Army CCA, a three-judge panel of which generally affirmed his conviction and sentence (with exceptions not here relevant) in a ruling issued on April 29, 2016. *See* Pet. App. 1. The Army CCA panel included Lieutenant Colonel Paulette Vance Burton and Colonel James Wilson Herring, Jr., both of whom had been confirmed by the Senate the previous day (along with Army Colonel Larss G. Celtnieks and Air Force Colonel Mitchell) as "additional judges" of the CMCR under 10 U.S.C. § 950f(b)(3). *See* 162 CONG. REC. S2600 (daily ed., Apr. 28, 2016). As noted above, Cox subsequently petitioned CAAF for review, which was granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 11a.

Petitioner Courtney A. Craig is a Specialist in the U.S. Army who was convicted, in accordance with his pleas, of attempted indecent visual recording, in violation of Article 80 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880. Craig was sentenced

to a reduction in grade, to 20 days' confinement, and to a bad-conduct discharge. On appeal, an Army CCA panel that included both Judges Herring and Burton affirmed the conviction and sentence in all respects. *See* Pet. App. 12a. That decision was dated May 10, 2016, even though Judges Herring and Burton had both been confirmed by the Senate on April 28 to serve as "additional judges" on the CMCR. As noted above, Craig subsequently petitioned CAAF for review, which was granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 14a.

Petitioner Andre K. Lewis is a Staff Sergeant in the U.S. Air Force who was convicted, contrary to his pleas, based upon his culpability in two separate sexual misconduct incidents approximately 18 months apart. He was sentenced to a dishonorable discharge, confinement for six years, a reduction in grade, and forfeiture of all pay and allowances. He appealed his conviction to the Air Force CCA, a three-judge panel of which generally affirmed his conviction and sentence (with exceptions not her relevant) on March 29, 2016. *See* Pet. App. 15a. Lewis subsequently moved the Air Force CCA for reconsideration. After his motion was assigned to a "special panel" that included Judge Mitchell, the panel denied the motion for reconsideration on May 17, 2016, even though Mitchell had been confirmed by the Senate on April 28 to serve as an appointed judge of the CMCR. *See* Pet. App. 46a. On May 30, 2016, Lewis moved the special panel for reconsideration of its ruling on the ground that Mitchell's appointment to the CMCR had disqualified him from continuing to serve on the Air Force CCA. It does not appear that the Air Force CCA ever ruled on Lewis's second motion for reconsideration. As noted above, Lewis subsequently

petitioned CAAF for review, which was granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 51a.

Petitioner Ian T. Miller is a Specialist in the U.S. Army who was convicted, contrary to his pleas, of two specifications of sexual assault of a child in violation of Article 120b of the UCMJ, 10 U.S.C. § 920b. He was sentenced to a reduction in grade, 20 months' confinement, and a bad-conduct discharge. He appealed his conviction and sentence to the Army CCA, a three-judge panel of which affirmed on May 6, 2016. *See* Pet. App. 52a. The Army CCA panel included Judge Celtnieks, who had been confirmed as an "additional judge" of the CMCR on April 28, 2016. As noted above, Miller subsequently petitioned CAAF for review, which was granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 54a.

Petitioner Joseph D. Morchinek is a Senior Airman in the U.S. Air Force who was convicted, contrary to his plea, of misbehavior before the enemy in violation of Article 99 of the Uniform Code of Military Justice, 10 U.S.C. § 899, and who pled guilty to a minor drug offense. He was sentenced to a bad-conduct discharge, confinement for two months, forfeiture of $1,021 pay per month for two months, a reduction in grade, and a reprimand. He appealed his Article 99 conviction to the Air Force CCA, a three-judge panel of which affirmed the conviction and sentence in all respects on May 9, 2016. *See* Pet. App. 55a. The Air Force CCA panel included Judge Mitchell—who had been confirmed as an additional judge of the CMCR on April 28, 2016. As noted above, Morchinek subsequently petitioned CAAF for review, which was

granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 67a.

Petitioner Kelvin I.L. O'Shaughnessy is an Airman First Class in the U.S. Air Force who was convicted, contrary to his pleas, of one charge and one specification each of sexual assault and abusive sexual contact, in violation of Article 120 of the UCMJ, 10 U.S.C. § 920. He was sentenced to a bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and a reduction in grade. He appealed to the Air Force CCA, a three-judge panel of which affirmed the convictions and sentence in all respects on May 5, 2016. *See* Pet. App. 68a. The Air Force CCA panel included Judge Mitchell—who had been confirmed as an additional judge of the CMCR on April 28. As noted above, O'Shaughnessy subsequently petitioned CAAF for review, which was granted—and then, after and in light of *Dalmazzi*, vacated and denied. *See* Pet. App. 78a.

REASONS FOR GRANTING THE PETITION

I. These Cases Raise the Same Questions as Those Presented in *Dalmazzi*

In addition to the substantive dual-officeholding questions presented in *Dalmazzi* and here (and over 100 additional cases now pending in the Court of Appeals),[3] the Petitioners' cases raise the same

3. In a terse order issued on February 9, 2017, the Court of Appeals affirmed an Air Force CCA decision in a case raising the same dual-officeholding questions, noting that "[t]he opinion of the Court will be issued on a future date." *United States* v. *Ortiz*, No. 16-671, at 1 (C.A.A.F. Feb. 9, 2017) (mem.), *reprinted at* Pet. App. 79a; *see also United States* v. *Buford*, No. 16-689, at 1 (C.A.A.F. Feb. 13, 2017) (mem.) ("[T]he granted assigned issues are without merit in view of our holding in *United States* v. *Ortiz* . . . ."), *reprinted at* Pet. App. 80a. If CAAF has indeed

"mootness" question as that raised by the Petition in *Dalmazzi*. *See* Petition for a Writ of Certiorari at 10–12, *Dalmazzi*, No. 16-961.

In *Dalmazzi*, the Court of Appeals held that a dual-officeholding challenge to the continuing CCA service by an "appointed judge" of the CMCR was "moot" because the President had not yet signed the challenged judge's CMCR commission at the time the relevant CCA decision was handed down. *See Dalmazzi*, 76 M.J. at 3. As the Petition in *Dalmazzi* explained, though, this analysis was "based upon a factually and legally indefensible application of the wrong doctrine." Petition for a Writ of Certiorari at 10, *Dalmazzi*, No. 16-961.

"As long as the parties have a concrete interest . . . in the outcome of the litigation, the case is not moot." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted). Petitioners, whose sentences include substantial punishment, unquestionably have such an interest in pursuing the disqualification of judges from the CCA panels that upheld their convictions and sentences. Their appeals are emphatically not moot.

In our view, the Court of Appeals' concerns more properly sound in *standing* to challenge these judges' dual participation, *i.e.*, whether the Petitioners could claim a concrete injury arising from their service on the CMCR. *See, e.g.*, *Pashaian* v. *Eccelston Props., Ltd.*, 88 F.3d 77, 83 (2d Cir. 1996) (discussing standing to seek a judge's disqualification). But even viewed through the proper doctrinal lens, the Court of

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rejected these claims on the merits, that only bolsters the case for this Court's intervention both in *Dalmazzi* and here. *See* Petition for a Writ of Certiorari at 13–17, *Dalmazzi*, No. 16-961.

Appeals' analysis in *Dalmazzi* failed to account for the plain text of the dual-officeholding ban, which applies to military officers who "hold" *or* "exercise the functions" of a civil office. *See* 10 U.S.C. § 973(b)(2)(A)(ii).

Whether or not Judges Burton, Celtnieks, Herring, or Mitchell formally "held" the position of "additional judge" of the CMCR before President Obama signed their commissions, there is no question that they "exercise[d] the functions" of that position at the same time that they sat on Petitioners' CCA panels—by taking the oath of office as CMCR judges; by participating in orders in pending CMCR cases; and by handing down decisions in pending CMCR cases. *See* Petition for a Writ of Certiorari at 11–12, *Dalmazzi*, No. 16-961.

* * *

Thus, if this Court grants the petition in *Dalmazzi* and reverses or vacates the Court of Appeals' "mootness" analysis, it should also vacate CAAF's orders in the Petitioners' cases—and return these cases to CAAF for further proceedings in light of *Dalmazzi*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 2017

No. 16-____

IN THE

Supreme Court of the United States

LAITH G. COX, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

APPENDIX TO THE PETITION

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UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before
MULLIGAN, HERRING, and BURTON
Appellate Military Judges

UNITED STATES, Appellee
v.
Captain LAITH G. COX
United States Army, Appellant

ARMY 20130923

Headquarters, U.S. Army Maneuver Support Center of Excellence
Jeffrey R. Nance and Gregory A. Gross, Military Judges
Colonel Robert F. Resnick, Staff Judge Advocate

For Appellant: Captain Jennifer K. Beerman, JA; Mr. Frank J. Spinner, Esquire (on brief); Captain Jennifer K. Beerman, JA; Mr. Frank J. Spinner, Esquire (on reply brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major John K. Choike, JA (on brief).

29 April 2016

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

BURTON, Judge:

An officer panel of sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of aggravated sexual assault of a child, two specifications of indecent liberties with a child, three specifications of sodomy with a child who had attained the age of 12 years but was under age of sixteen years, one specification of conduct unbecoming an officer, three specifications of indecent language to a child, one specification of producing child pornography, one specification of viewing child pornography, and one specification of obstructing justice, in violation of Articles 120, 125, 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, 933, 934 (2006 & Supp. IV 2011) [hereinafter UCMJ]. The panel sentenced appellant to a dismissal and confinement for forty years. The convening authority approved the findings and sentence as adjudged and credited appellant with nineteen days against the sentence to confinement.

Appellant's case is before this court for review under Article 66, UCMJ. Appellate defense counsel raises four errors, one of which merits discussion and

partial relief.[1] After review of the entire record, we find no evidence to support various specifications of Charge III as being prejudicial to good order and discipline in the armed forces. We will provide relief in our decretal paragraph.

FACTS

Appellant, a thirty-two year old, married man, met Miss DS, a fourteen year old girl,[2] on an adult-oriented website.[3] On that website, DS represented herself as a nineteen year old woman.[4] Appellant contacted DS through the website. They spoke several

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[1] We have also reviewed those matters personally raised by appellant pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), and they are without merit.

[2] DS testified she was born on 25 September 1996. Thus at the time of the incident on 11 September 2011, she was fourteen years old.

[3] The adult-oriented website is for people who would like to indulge in their sexual fantasies, and a relationship site for people who want a fling, casual dating, or sexual encounter with men, women, transsexuals, and/or couples.

[4]The website does not allow guests under the age of eighteen to register for the website. At the time of trial DS was seventeen years old.

times on the phone and communicated through electronic media to include text messages and email. On 11 September 2011, appellant set up a time to meet DS in Norman, Oklahoma. On their first meeting appellant met DS in a parking lot across the street from where she lived with her mother and younger sisters. They engaged in sexual intercourse in appellant's vehicle and appellant took photos of DS in various stages of undress. Later that night, appellant met DS in the same parking lot. They drove to a motel where appellant engaged in anal, oral and vaginal intercourse with DS. Appellant took photographs and video-recorded the sexual acts with DS.

On 1 October 2011, appellant visited DS again. He picked her up in a parking lot near her home and drove to a motel. While at the motel, they again engaged in various sexual acts to include anal, oral and, vaginal intercourse. Appellant once again took photographs and video-recorded these sexual acts.

Appellant and DS discussed her age on several occasions. DS testified that before they met, she was on the telephone with appellant while she was attending a "kid's party." When appellant inquired as to why she was at a "kid's party," she told him she was fourteen years old and he replied, "[i]t doesn't really matter. I already like you anyway." According to DS she never told him any other age other than fourteen with the exception of what he saw posted on the adult-oriented website. On the video taken on 11 September 2011, prior to any sexual acts occurring, appellant

asked DS to state her name and her age, and DS responded with her name and "fourteen." DS was aware that appellant was in the Army because he told her. Law enforcement located appellant by contacting a military installation.

LAW AND ANALYSIS

In accordance with Article 66(c), UCMJ, we review issues of legal and factual sufficiency de novo. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987); *see also Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Humphreys,* 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner,* 56 M.J. 131, 134 (C.A.A.F. 2001). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner,* 25 M.J. at 325.

Appellant claims there is no evidence that the conduct alleged in Specifications 1, 2, 4 and 5 of

Charge III was prejudicial to good order and discipline.[5] We have no dispute that appellant engaged in such conduct, as photographs and videos were admitted at trial of appellant engaging in the conduct as charged. Appellant informed DS that he was in the military and civilian law enforcement officials contacted a military installation to obtain information about appellant's location. The evidence is more than sufficient to support a finding appellant's conduct was service discrediting.

However, our review of the record discloses no evidence to show that appellant's misconduct had any impact on the good order and discipline of his unit. We find the evidence to be less than minimal and insufficient to sustain a finding of guilty as to that language.

CONCLUSION

Having completed our review and in consideration of the entire record, we AFFIRM only so much of the Specifications 1, 2, 4 and 5 of Charge III as finds:

> Specification 1: In that [appellant], did, while on board the SS OAK HILL and/or

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[5] Appellant alleges that the evidence is factually insufficient to sustain a conviction of the specifications alleged in Charges I and III and the Additional Charge. We only address the sufficiency of Charge III and its specifications as they pertain to prejudice to good order and discipline.

assigned to Key West Naval Air Station,[6] on or about 10 December 2011, in writing communicate to Ms. [DS], a child under the age of 16 years, certain indecent language, to wit:

> "I would wear a mask, so all she would know is that I was hella old, and then just to make my point I would pull out of you and nut on her face. Then as it dripped down cuz she couldn't wipe it cuz her hands are tied, I'd just fuck you again,"
>
> "I was getting worried I wouldn't get to pound your sexy ass again,"
>
> "I need my little sluts pussy like now,"
>
> "you still want me to rape you,"
>
> "I wish I could come over there and fuck you all over her bed,"

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[6] In Specification 1 and 2 of Charge III, appellant was charged with "while on board the SS OAK HILL[sic]; he was found guilty except the words "SS OAK HILL" substituting therefore the words "SS OAK HILL and/or assigned to Key West Naval Air Station." We note the proper designation of this vessel is "USS Oak Hill." We hold the incorrect designation harmless in Specifications 1, 2, and 5 of Charge III.

"I could really use some pussy right now, its been fucking months,"

or words to that effect, and that such conduct was of a nature to bring discredit upon the armed forces.

Specification 2: In that [appellant], did, while on board the SS OAK HILL and/or assigned to Key West Naval Air Station on about 24 December 2011, in writing communicate to Ms. [DS], a child under the age of 16 years, certain indecent language, to wit:

"remember what I said that one time about fucking you in front of her and then bustin my nut all over her face,"

"how about you just bring her alone and she can watch me fuck you and then we will see what she is up for,"

"who is [KW]? Well I'd like to fuck around with her"

"I just want her to watch me fuck you and
suck on my dick a little and video me cumming on her, you think she would come and play, and I promise

> I won't fuck her, thats what I want for Christmas,"
>
> or words to that effect, and that such conduct was of a nature to bring discredit upon the armed forces.
>
> Specification 4: In that [appellant], did at or near Norman, Oklahoma, between on and about 11 September 2011 to on or about 2 October 2011, knowingly and wrongfully produce child pornography to wit: a video of sexually explicit conduct between the said [appellant] and Ms. [DS], a child under the age of 16, and that such conduct was of a nature to bring discredit upon the armed forces.
>
> Speciation 5: In that [appellant], did while on board the SS OAK HILL, between 20 December 2011 to on or about 24 December 2011, knowingly and wrongfully view child pornography, to wit: a video of sexually explicit conduct between the said [appellant] and Ms. [DS], a child under the age of 16, and that such conduct was of a nature to bring discredit upon the armed forces.

The remaining findings of guilty are AFFIRMED. We are able to reassess the sentence on the basis of the error noted and do so after conducting a

thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann,* 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States* v. *Sales,* 22 M.J. 305 (C.M.A. 1986). The maximum sentence appellant could have received included confinement in excess of 100 years. We are confident that based on the entire record and appellant's course of conduct, the panel would have imposed a sentence of at least that which was adjudged, and accordingly we AFFIRM the sentence. We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored.

Senior Judge MULLIGAN and Judge HERRING concur.

FOR THE COURT:

[SIGNATURE]
MALCOLM H. SQUIRES, JR.
Clerk of Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Laith G. Cox, Appellant	USCA Dkt. No. 16-0635/AR Crim.App. No. 20130923 ORDER

On further consideration of the granted issues, 75 M.J. 457 (C.A.A.F. 2016), the facts that the United States Army Court of Criminal Appeals issued its judgment in Appellant's case on April 29, 2016, and Appellate Military Judges Paulette V. Burton and James W. Herring were appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 17th day of January 2017,

ORDERED:

That the order issued October 3, 2016, granting review is hereby vacated; and

That Appellant's petition for grant of review is hereby denied.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before
MULLIGAN, HERRING, and BURTON
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist COURTNEY A. CRAIG
United States Army, Appellant

ARMY 20150272

Headquarters, Fort Riley

Charles L. Pritchard, Jr., Military Judge
Lieutenant Colonel Timothy A. Furin, Staff Judge Advocate

For Appellant: Major Christopher D. Coleman, JA (argued); Lieutenant Colonel Charles D. Lozano, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Christopher D. Coleman, JA (on brief).

For Appellee: Captain Christopher A. Clausen, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie, III, JA; Major Daniel D. Demer, JA; Captain Christopher A. Clausen, JA (on brief).

10 May 2016

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.. [sic]

FOR THE COURT:

[SIGNATURE]
MALCOLM H. SQUIRES, JR
Clerk of Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Courtney A. Craig, Appellant	USCA Dkt. No. 16-0650/AR Crim.App. No. 20150272 ORDER

On further consideration of the granted issues, 75 M.J. 470 (C.A.A.F. 2016), the facts that the United States Army Court of Criminal Appeals issued its judgment in Appellant's case on May 10, 2016, and Appellate Military Judges Paulette V. Burton and James W. Herring were appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 17th day of January 2017,

ORDERED:

That the order issued October 20, 2016, granting review is hereby vacated; and

That Appellant's petition for grant of review is hereby denied.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

****CORRECTED COPY –
DESTROY ALL OTHERS****

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES
v.
Staff Sergeant ANDRE K. LEWIS
United States Air Force

ACM 38671

29 March 2016

Sentence adjudged 21 April 2014 by GCM convened at Misawa Air Base, Japan. Military Judge: Matthew Stoffel (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Thomas A. Smith.

Appellate Counsel for the United States: Captain Tyler B. Musselman and Gerald R. Bruce, Esquire.

Before

ALLRED, TELLER, and ZIMMERMAN
Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

TELLER, Senior Judge:

~~Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, assault consummated by a battery, and adultery, in violation of Articles 107, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 907, 920, 928, 934.~~ Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, and assault consummated by a battery, in violation of Articles 107, 120, and 128, 10 U.S.C. §§ 907, 920, and 928.

The court sentenced him to a dishonorable discharge, confinement for 6 years, reduction to E-1, and forfeiture of all pay and allowances. The sentence was approved, as adjudged, on 1 September 2014.

The court sentenced him to a dishonorable discharge, confinement for 6 years, reduction to E-1, and forfeiture of all pay and allowances. The sentence was approved, as adjudged, on 1 September 2014.

Appellant argues that (1) his conviction for aggravated sexual assault of one victim is factually insufficient; (2) his convictions for abusive sexual contact, aggravated sexual contact, and assault consummated by a battery of a second victim (and the related false official statement conviction) are legally and factually insufficient; (3) the remaining conviction for false official statement is legally and factually insufficient; and (4) he was prejudiced by the re-assignment of a paralegal who assisted in his defense to the base legal office that prosecuted his case.[1] We find some merit in Appellant's factual sufficiency argument con-cerning the aggravated sexual contact conviction and modify the findings and reassess the sentence as de-scribed below. We affirm the remainder of the find-ings.

Background

Appellant was convicted of misconduct related to two separate incidents approximately 18 months apart. The first incident, which occurred in November 2011 as Appellant was preparing to leave Ramstein Air Base (AB), Germany, involved sexual acts with Staff Sergeant (SSgt) HP while she was substantially incapacitated. The second, which occurred on or about 13 April 2013 at Misawa AB, Japan, involved several

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[1] The third and fourth assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

charges related to unwanted sexual contact and battery of SSgt YM.[2]

Germany Offenses

There was substantial testimony about the interaction between Appellant and SSgt HP during the evening prior to the sexual misconduct in Germany. SSgt HP was part of a group of Airmen celebrating her birthday and a colleague's impending departure. Appellant had recently returned from a deployment. Appellant had originally planned to go out with a friend of his, SSgt MS, and a friend of SSgt MS, Mr. RZ. Prior to going out, Appellant parked his car at Mr. RZ's home. In an apparent coincidence, Appellant and SSgt HP ran into each other at a dance club off-base.

The evidence is compelling that SSgt HP became severely intoxicated while at the club. SSgt HP testified that she recalled dancing with Appellant for a few songs then going to sit down with a group of friends. After that, with the exception of two brief memories, she has no recollection of events until she woke up with Appellant at Mr. RZ's home. The two brief memories both involve sexual acts with Appellant which will be discussed in more detail below.

While there was no independent evidence of the circumstances surrounding Appellant's and SSgt HP's

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[2] Although Appellant was charged with sexual and other misconduct related to a third victim in 2012, he was acquitted of all of those charges.

departure from the club, Appellant gave a description of the events to agents from the Air Force Office of Special Investigations (AFOSI). The written transcript of the interview and Appellant's written statement were admitted into evidence by the Government. Appellant told AFOSI that he noticed bouncers preparing to escort SSgt HP from the club because of her obvious intoxication and he decided to take her outside to get a taxi. Appellant could not find a taxi willing to take SSgt HP because of her state of drunkenness. At some point, SSgt HP also began to vomit, complicating efforts to convince a taxi to take her home. After his initial efforts to find a taxi for SSgt HP failed, Appellant went back into the club to persuade someone from SSgt HP's group of friends to take responsibility for her. According to Appellant, none of the friends he could find were amenable. Other witnesses who had accompanied SSgt HP to the club testified that they saw Appellant during this time and he did not ask them to help SSgt HP get home. Appellant told AFOSI that he then decided to get his belongings and get a taxi himself to take SSgt HP home. When Appellant left the club, SSgt HP was no longer in the parking lot, and a bouncer suggested he check the "drunk tent," a small shelter in the parking area to keep intoxicated patrons from being injured. Appellant found SSgt HP passed out in the drunk tent, and after about 40 minutes, finally found a taxi willing to take them. Appellant described the ride as "a bit of a ways" from the club and told agents that the taxi had to stop once during the trip for SSgt HP to step out to vomit. When they arrived at SSgt HP's home, Appellant did not just drop her off, but rather paid for the

taxi and got out with SSgt HP. Shortly thereafter, Appellant discovered that SSgt HP did not have her keys. Although SSgt HP easily got in the next day through a partially barred door, she was unable to do so that night and Appellant had no way of getting SSgt HP into the house. Appellant took SSgt HP to the partially open garage and set out a tarp for her to lie down on while he tried to arrange for a ride to Mr. RZ's house.

There is scant evidence of what time Appellant and SSgt HP had left the club. One witness estimated that she arrived with SSgt HP at 0115, stayed for two or three hours, and saw Appellant picking up his coat as she was leaving the club. By her estimate, that would have been approximately 0415. Appellant's cell phone showed a text from Appellant to SSgt MS at 0458, apologizing for leaving the club without him, but making no mention of needing to be picked up from SSgt HP's home. Appellant sent another text message to SSgt MS at 0502 describing SSgt HP as "almost dead." Less than 10 minutes later, Appellant sent a text to SSgt MS, asking him to send a taxi to SSgt HP's home to pick him up. His cell phone memory also indicated several phone calls and texts from 0506 to at least 0600 that are consistent with Appellant's account of the time he spent in the garage of SSgt HP's home.

Appellant was eventually successful in getting his friends to pick them up from SSgt HP's house. Around 0600, SSgt MS and Mr. RZ arrived at SSgt HP's home in a taxi to take Appellant and SSgt HP to

Mr. RZ's house. While Appellant's friends testified that SSgt HP was lucid when she arrived at the house, the evidence of bias and lack of candor with law enforcement render that testimony unworthy of belief.

The primary evidence relating to the charged sexual acts comes from Appellant, although SSgt HP testified about two "flashes" of memory. According to Appellant, SSgt HP lay down on the guest room futon, and rather than joining her, he lay down on the floor. After about 30 minutes, he asserts, she verbally invited him to have sex with her, but he demurred. After 10 minutes, he decided to check on her, and she pulled him onto the futon by his belt. According to Appellant, despite her intoxication to the point of passing out when they left the club, SSgt HP had recovered enough to become the sexual aggressor. His version of events describing himself as reluctantly acceding to her sexual advances was unconvincing in light of the evidence of her state of intoxication just hours earlier. SSgt HP testified that she had only two brief recollections between sitting down at the club and waking up the next morning late for work. The first memory started with her being "face down" on a bed with a person who she later identified as Appellant penetrating her from behind. When asked to describe her position more fully, she testified,

> [SSgt HP:] Um, I was, yeah I was face down. Um, I came from my face up, up from the bed, him, to look behind me [the witness waived her left hand up]. Um, my, um, my legs were hanging over the

edge of the bed. Um, my knees, well, my knees were at the edge of the bed.
[Trial Counsel:] And where were your stomach and chest with respect to the bed?

[SSgt HP:] I'm not 100% sure. I pushed up and looked back.

[Trial Counsel:] Did you—how long do you—how long was this piece of memory that you have?

[SSgt HP:] Seconds.

SSgt HP's next recollection was being in the shower with Appellant, but she did not recall any sexual acts during that brief memory.

The next morning, Appellant took SSgt HP to work, where the allegations came to light. Appellant woke SSgt HP up at approximately 1100 because he knew she was scheduled to work. He drove her to her house, where she entered through the partially barred door and changed into her uniform. Appellant then drove her to work. After contacting some friends who were at the club with her, she spoke to her supervisor. She told him that she had become intoxicated, that she remembered Appellant penetrating her, and that she had not wanted that to happen. The incident was investigated by AFOSI. During the investigation Appellant made specific statements of fact about interactions he had with SSgt HP's friends at the club that,

according to the testimony of these individuals, did not occur. No action was taken against Appellant at that time.

Japan Offenses

The evidence surrounding Appellant's offenses in Japan is more complete. Unlike the offenses in Germany, this victim's intoxication did not impair her memory, and she testified fully about Appellant's conduct.

Appellant arrived at Misawa AB, Japan, in March 2013 and soon became friends with the victim, SSgt YM. SSgt YM served as Appellant's informal sponsor when he first arrived, and they worked together on the same shift in one of the base dining facilities. Although SSgt YM was in a relationship with Sergeant First Class (SFC) JJ, she and Appellant were good friends and often socialized together.

On 12 April 2013, after a night of drinks and dancing, Appellant and SSgt YM got a suite in on-base lodging. Originally, SSgt YM planned to go out with SFC JJ and perhaps some others to have some drinks. Ultimately SFC JJ was unable to go out because of his duties. Appellant agreed to go out with SSgt YM, but no one else wanted to join them. The two went to a few different bars, ending up at the on-base club, where Appellant tried to teach SSgt YM salsa dancing. While both Appellant and SSgt YM were drinking, neither was substantially intoxicated. A base curfew policy required Airmen in the rank of SSgt or below to be either on base or in their residence by midnight. It was not

unusual for non-commissioned officers subject to the curfew who lived off base to get a room at the on-base lodging facility so they could spend the night on base after going to the club. SSgt YM agreed to get a two-room suite at lodging, planning for her to spend the night in the bedroom and for Appellant to sleep on the sofa in the living room.

The evidence conflicts concerning what happened after the two arrived at lodging. SSgt YM testified as to her recollection of events, and Appellant made statements about the events which were later admitted into evidence. According to both accounts, SSgt YM was disappointed and angry that SFC JJ did not make it a priority to come out with her that night.

SSgt YM testified that as soon as they got in the elevator, Appellant unexpectedly put his arms around her from behind with a "pretty firm grip." Although she testified that she did not want him to place his arms around her and was hoping he would let go, she did not say anything to him. After they got in the room, Appellant removed his arms and SSgt YM sat down in an upholstered chair. Appellant pulled a table next to SSgt YM and began to aggressively ask her if she would have sex with him. SSgt YM testified that she told him no. SSgt YM described how Appellant would use his hand to turn her face back towards him whenever she looked away. SSgt YM testified that he then began to ask her just to kiss him; "[h]e grabbed my, he grabbed my head along my jaw and chin, and he pulled my face towards his and told me to kiss him,

and he pressed my face up against his." She testified about her perception of the force used by Appellant.

> [Trial Counsel:] What level of force was he using at that particular point?
> [SSgt YM:] Um, he was very aggressive. If I were to try to get away, I wouldn't have been able to.
>
> [Trial Counsel:] What makes you say that you wouldn't have been able to get away from him?
>
> [SSgt YM:] I remember the grip on my face being very tight. And if I tried to turn my head, he would turn it back towards his.
>
> [Trial Counsel:] Did he actually succeed in kissing you while he was doing this?
>
> [SSgt YM:] Yes, ma'am.
>
> [Trial Counsel:] What was your reaction when he was doing this to you?
> [SSgt YM:] I was scared.
>
> [Trial Counsel:] Can you go into more detail about why you were scared?
>
> [SSgt YM:] Um, I was in shock that it was happening, and I didn't know what to do right at that moment. I was afraid

that if I tried to get away, that something was going to happen to me.

[Trial Counsel:] When you say something was going to happen to you, what you mean by that?
[SSgt YM:] Um, with the way he was being aggressive, I didn't know what else could happen. Not necessarily that he was going to try to hit me, but I didn't know what was going to happen.

[Trial Counsel:] Did you kiss him back at any point?

[SSgt YM:] Yes, ma'am. I did.

[Trial Counsel:] And why did you kiss him back?

[SSgt YM:] I thought that if I kissed him back, he would leave me alone.

SSgt YM testified that during this time Appellant also touched her breasts. She testified that while Appellant was kissing her, and she continued to protest, Appellant placed his hands down the front of her shirt and touched her breasts, although she could not recall whether it was directly or through her clothing.

[Trial Counsel:] When he put his hands down your shirt, what exactly did he touch?

[SSgt YM:] He touched my breasts.

[Trial Counsel:] Did he touch your breasts through—did he actually touch the skin of your breasts, or was he just touching some article of clothing?
[SSgt YM:] I don't remember.

[Trial Counsel:] Could you feel his hands actually touching your breasts?

[SSgt YM:] I remember feeling them touch the top of my chest, but I don't remember if they touched my actual—the lower part of my breasts.

[Trial Counsel:] Is it fair to say he was touching the upper parts of your breasts?

[SSgt YM:]: Yes, ma'am.

She described the level of force used to touch her breasts as "maybe a three or four" on a scale of one to ten. She successfully pushed his hands away. She also testified that Appellant removed his shirt and "grabbed [her] hands and put them on his chest, and he also made [her] kiss his chest." She described the level of force he used as a seven out of ten, and stated that she was unable to pull her hands away. SSgt YM testified that after he tried unsuccessfully to get her

to kiss him, Appellant asked if he should get a separate room. When she replied that he should, Appellant left.

After Appellant left the room, SSgt YM exchanged a series of calls and instant messages with SFC JJ. SSgt YM asked him to come to the room, but SFC JJ initially declined. In one message, she told SFC JJ, "I OBVIOUSLY NEED U [sic] HERE." She explained the lack of any specific reference to Appellant's conduct as an attempt to avoid making SFC JJ upset before he arrived, but said she wanted him there because she "was afraid" Appellant would come back. The military judge later clarified with her that her fear was not for her physical safety, but instead that Appellant "could have been more aggressive with trying to get [her] to have sex with him or kiss him."

Appellant did in fact return to SSgt YM's room about 20 minutes after he left. He knocked on the door, and SSgt YM, feeling "pretty sure" that it was Appellant, opened the door. SSgt YM testified that over the next three to four minutes Appellant resumed his entreaties to have a relationship with him, again using a force of about seven to bring her lips to his and bring her hands to his chest. She also recounted how he "in the same manner as before" placed his hands down her shirt. She described this interaction as occurring with her seated on the couch and Appellant kneeling in front of her. She further testified that after getting up to leave, Appellant again tried to pull her towards him to kiss him, and as she was trying to pull away, her arm came free and she hit herself in

the mouth with her phone. Specifically, she said that he placed a hand around each of her wrists and tried to pull her towards him using a force of nine out of ten. She testified:

> [Trial Counsel:] And so did he have one hand around each wrist?
>
> [SSgt YM:] Yes, ma'am.
> [Trial Counsel:] Were you holding anything in either of your hands?
>
> [SSgt YM:] Yes, ma'am. I had my phone in my right hand.
>
> [Trial Counsel:] And so can you describe how hard you were pulling away—trying to pull away from him?
>
> [SSgt YM:] It—I would have to put a lot of force behind it.
>
> [Trial Counsel:] How long would you say that he was holding her [sic] hands in that particular position?
>
> [SSgt YM:] Just a few seconds.
>
> [Trial Counsel:] How long did you have to pull away before you were successful?
>
> [SSgt YM:] I'd say maybe 2 to 3 seconds.

[Trial Counsel:] Was it something—were you able to pull away right away or did it take some more effort?

[SSgt YM:] It took a little bit of effort.

[Trial Counsel:] What happened when—after you were successful in pulling away?
[SSgt YM:] I hit myself in the mouth with my phone, and once I realized I was bleeding, I went into the bathroom.

The military judge later followed up to attempt to clarify the degree of force used.

[Military Judge:] There were several times where trial counsel asked you how much force it was that Sergeant Lewis applied to you and you described it on a scale of 1 to 10. Can you tell me what one means and what 10 means?

[SSgt YM:] One would be if I could easily just roughly take my hands away. Ten is there is no way I could remove myself or no way I could remove myself from his grip.

[Military Judge:] So you had described that when he had his hands on your wrists trying to pull you towards him,

you described that as about a force of a nine?

[SSgt YM:] Yes, sir.

[Military Judge:] So were you able to pull your hands away or did he let your hands go?

[SSgt YM:] I think it was probably a combination of the two. I remember still—I remember having to put a lot of force behind pulling my hands away, but I think he may have let me go at the same time.

[Military Judge:] So if I understand it you had to use a lot of force to pull away, but you think that at some point when he realized you were—really did not want his hands on your wrists that he then let go?

[SSgt YM:] Yes, sir.
[Military Judge:] And is that when your hands came back toward your face?

[SSgt YM:] Yes, sir.

On cross-examination, SSgt YM agreed that she never contended that Appellant intended for the phone to hit her mouth, and agreed the contact was accidental. SSgt YM testified that after she went to the bathroom to check her injury, she and Appellant

had a brief, heated conversation, and then Appellant left the room. SFC JJ arrived shortly afterwards, and after some discussion with SSgt YM, SFC JJ reported the incident to security forces.

The investigation was referred to AFOSI, who initiated a pretext phone call from SSgt YM to Appellant and then called Appellant in for an interview. In both the interview and the pretext phone call, Appellant contended that there was no contact beyond mutual kissing. He asserted that once they were in the room, the space between them "closed up" and they kissed. He told the agents that his hands were on SSgt YM's hips while they kissed. He told the agents that they first kissed near the door, then had a conversation about relationships as they sat down in the living area. He said SSgt YM got emotional talking about SFC JJ and they hugged, which led to another kiss. He stated after the kiss SSgt YM felt guilty, and he brought up again that he should get his own room. When asked if SSgt YM displayed any physical resistance, Appellant said after the second kiss they just stopped and that "there was no tug-of-war at all." Appellant did volunteer that he returned to SSgt YM's room after getting his own, but at first stated that they just talked during his second visit to the room. As the interview progressed, Appellant's account of the second visit changed, and Appellant told AFOSI that they kissed during the second visit as well. When asked if anything else happened during that visit, he told the agents that SSgt YM slipped off the arm of the chair where he was sitting and hit her mouth on his shoulder. The photos of the injury to SSgt YM's mouth

admitted into evidence clearly show an injury to SSgt YM's gums above her teeth. During the pretext phone call, Appellant asked SSgt YM repeatedly not to tell anyone about the night's events.

Factual Sufficiency—Aggravated Sexual Assault

Appellant first argues that the evidence of aggravated sexual assault of SSgt HP was factually insufficient to sustain his conviction. We review issues of factual sufficiency de novo. *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our factual sufficiency determination is limited to a review of the entire record, meaning evidence presented at trial. *Reed*, 54 M.J. at 43; *United States v. Bethea*, 46 C.M.R. 223, 225 (C.M.A. 1973).

We have reviewed the record of trial and evaluated the arguments by Appellant and the Government. We have weighed the entire record of trial and have made allowances for not having heard and observed the witnesses. Given the totality of the circumstances, and in light of all of the evidence in this case, we are convinced beyond a reasonable doubt of Appellant's guilt of aggravated sexual assault of SSgt HP.

Factual and Legal Sufficiency—Offenses Relating to SSgt YM

Appellant next asserts that the evidence is factually and legally insufficient to support the convictions of the offenses relating to SSgt YM. Appellant was convicted of four offenses related to SSgt YM. First, he was convicted of making a false official statement to AFOSI concerning the source of SSgt YM's injury to her mouth. Second, he was convicted of abusive sexual contact3 for touching SSgt YM's breast without permission. Third, he was convicted of aggravated sexual contact for causing SSgt YM to touch his chest with her hands and lips by using unlawful force, specifically physical strength sufficient that she could not avoid or escape the sexual contact. Finally, Appellant was convicted of assault consummated by a battery for unlawfully restraining her by her wrists. Appellant contends that the evidence was legally insufficient as to the abusive sexual contact offense because "there was no evidence elicited at trial that Appellant touched SSgt YM's breast through her clothing." He also asserts that the evidence was factually insufficient with regard to the other offenses "because SSgt

YM is not credible and had a motive to fabricate the allegations against Appellant." We apply the same standard with regard to factual sufficiency as articulated above. We review the legally sufficiency of the evidence de novo. *Beatty*, 64 M.J. at 459.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *Turner*, 25 M.J. at 324). The term reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R.1986). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

We find the evidence of abusive sexual contact legally sufficient. Although SSgt YM did express uncertainty about whether Appellant touched her directly or through some article of clothing, her testimony was clear that Appellant touched her breast. While her uncertainty raised an issue about whether he touched all of her breast directly, or only some part of it, it never contradicted her initial assertion that Appellant touched her breast in some manner. Viewing this testimony in the light most favorable to the

prosecution, we conclude that a reasonable finder of fact could have concluded beyond a reasonable doubt that Appellant touched some part of SSgt YM's breast through her clothing. We ourselves, after making allowances for not having seen the testimony, are also convinced beyond a reasonable doubt of Appellant's guilt of abusive sexual contact.

We are similarly convinced of Appellant's guilt beyond a reasonable doubt of the offenses of false official statement and assault consummated by a battery. The injury depicted in the photographs admitted into evidence is completely consistent with SSgt YM's account of Appellant's second visit to her room, and does not support either of the versions Appellant provided to AFOSI during his interview. SSgt YM testified that Appellant grabbed her wrists with unlawful force, and in the course of escaping from his grasp her cell phone struck her mouth and caused the injury to her gums. She also testified that she confronted Appellant, making him aware of the injury. We find that evidence factually sufficient to sustain his convictions.

We are not convinced beyond a reasonable doubt, however, of Appellant's guilt of the charged offense of aggravated sexual contact for causing SSgt YM to touch his chest with her hands and lips by using unlawful force. As alleged in Charge II, Specification 5, the Government was required to prove that Appellant used sufficient strength that SSgt YM could not avoid or escape touching Appellant's chest with her hands and lips. Several times during her testimony, the prosecution asked SSgt YM to characterize the

level of force used by Appellant. In describing the level of force used to cause her to touch his chest, SSgt YM characterized it as a seven on a scale of ten. She also testified that she could not pull her hands away, but we weigh that testimony in conjunction with her behavior that night, including her willingness to let Appellant back into her room after he had departed. When the military judge later asked her how much force Appellant used in grasping her wrists in the context of the battery offense, she characterized the level of force as nine out of ten, but testified that she was able to pull away. In light of her conflicting testimony, we are not convinced beyond a reasonable doubt that Appellant did in fact use such strength that SSgt YM could not have avoided or escaped the contact. Despite determining the evidence was factually insufficient to sustain the charged offense, we may nonetheless affirm so much of the finding that includes a lesser included offense. Article 59(b), UCMJ, 10 U.S.C. § 859(b). We are convinced beyond a reasonable doubt that Appellant caused SSgt YM to touch his chest with her hands and lips without her consent, and accordingly affirm the conviction to the lesser included offense of abusive sexual contact.

Factual and Legal Sufficiency—
2011 False Official Statement

Appellant, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), asserts that the evidence was factually and legally insufficient to sustain his conviction for the false official statement set out in Charge I, Specification 2. Appellant specifically

asserts that the evidence did not prove that he had the intent to deceive in making the statement, and that the evidence that the statement was false was unreliable. We apply the same standard for factual and legal sufficiency as set out above.

The assertion at issue is Appellant's statement that "[he] ran into a coworker [, SSgt BH,] and [he] asked [SSgt BH] to please help [him; SSgt BH] told [Appellant] [SSgt HP] was grown[,] going through a divorce[,] just take her home" or words to that effect. Appellant made this assertion both in his written statement and his verbal statement to AFOSI. The statement was made in the context of multiple assertions to AFOSI that Appellant had no preconceived intent to engage in sexual relations with SSgt HP, SSgt HP initiated the sexual contact, and he reluctantly acceded to her advances.

First, we find that a reasonable fact finder could have found beyond a reasonable doubt that no such verbal exchange took place between Appellant and the coworker, and we ourselves reach that conclusion beyond a reasonable doubt. The coworker testified at trial and unequivocally stated that no such conversation took place. The coworker, who had no apparent bias towards either party, recalled seeing Appellant as he was leaving the club. He testified that, contrary to Appellant's statement to AFOSI, Appellant affirmatively took responsibility for taking SSgt HP home. The coworker also recalled a brief exchange about the fact that SSgt HP's car was parked at the coworker's house, and that Appellant would make sure that she got it the next day. In light of the level

of detail of the coworker's testimony and his lack of bias, we find his testimony both legally and factually sufficient to conclude that the verbal exchange asserted in Appellant's statements did not occur.

Second, since we have no direct evidence of Appellant's intent to deceive, we must determine whether, in light of all the evidence, one could reasonably infer such intent from the surrounding circumstances. The charged statement was completely consistent with Appellant's other assertions that he only reluctantly took SSgt HP home in the first place. While his theme of being a reluctant partner may have been of little relevance to the offense as ultimately charged, our inquiry must focus on his intent at the time of making the statement. Appellant's verbal and written statements contain numerous assertions that SSgt HP initiated the sexual contact that night. In light of his other statements, we are convinced beyond a reasonable doubt that Appellant intended AFOSI to believe that he tried to find an alternative to leaving the club with SSgt HP to corroborate his other statements that he did not initiate the sexual contact that night. We also find the evidence sufficient to allow a reasonable finder of fact to reach that conclusion beyond a reasonable doubt.

Viewing the evidence in the light most favorable to the Government, we find a reasonable fact finder could have found all the essential elements of the offense beyond a reasonable doubt. Similarly, having weighed the evidence in the record of trial, making

allowances for not having personally observed the witnesses, we ourselves are personally convinced of Appellant's guilt beyond a reasonable doubt.

Reassignment of Defense Paralegal

Appellant's final assignment of error, also submitted pursuant to *Grostefon*, asserts that his substantial rights were prejudiced when SSgt TG, the defense paralegal assigned to assist in his defense, was reassigned to the base legal office that was prosecuting him. In a declaration subject to penalty of perjury, Appellant makes two specific claims: first, that shortly after speaking with Appellant, SSgt TG "was removed [from] his position at the [area defense counsel's office] and began working on the government[']s behalf"; and second, he "believe[d] information stemming from [their] discussions [was] told to the Government to bring about more false and [inaccurate] charges." Appellant alleges the sharing of privileged information constituted prosecutorial misconduct and that "the appearance of transferring SSgt [TG] to the military justice section of the base legal office also raises a legitimate question regarding the fairness of Appellant's trial."

We review arguments of prosecutorial misconduct raised for the first time on appeal for plain error. *See United States v. Akbar*, 74 M.J. 364, 398 (C.A.A.F. 2015) (reviewing for plain error an allegation raised for the first time on appeal that the government's control over the defense counsels' assignments consti-

tuted prosecutorial misconduct and unlawful command influence). Appellant must show not only the underlying facts alleged to constitute misconduct, but also that it resulted in some "unfairness in the proceedings." *Id.* at 399. In this case, Appellant makes only the speculative claim that privileged material was shared.[2] Appellant does not identify any information that came out at trial that he believes was obtained from privileged discussions. In fact, a plain reading of the record indicates that all of the evidence and the identity of witnesses related to the offenses of which he was convicted were disclosed through the course of a routine investigation. Both victims filed complaints with law enforcement independently and cooperated with the investigation. Appellant also made statements to AFOSI. While we are cognizant of the difficulty Appellant faces in proving the content of conversations that may have occurred between SSgt

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[2] We find that a fact-finding hearing on this issue pursuant to *United States v. DuBay*, 37 C.M.R. 411 (1967) is not necessary or appropriate. "[I]f [an] affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis." *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Since Appellant did not specify any information he believed was derived from privileged information, we find his claim to be speculative and conclusory. Although this court granted Appellee's motion to attach affidavits from legal office personnel pertaining to SSgt TG's involvement in the case, we did not consider them in reaching this decision.

TG and government personnel, we also recognize that one purpose of the plain error rule is to encourage such claims to be raised at trial so that the record can be fully developed. We find that Appellant failed to meet his burden to show any unfairness in the proceeding that resulted from SSgt TG's reassignment, and therefore find no plain error.

Sentence Reassessment

Because we have reduced Appellant's degree of guilt to one of the sexual contact offenses, we must determine whether we can reassess the sentence, or whether we must order a rehearing. This court has "broad discretion" in deciding to reassess a sentence to cure error and in arriving at the reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). To reassess the sentence, we must be able to reliably conclude that, in the absence of error, the sentence "would have been at least of a certain magnitude," and the reassessed sentence must be "no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Sales*, 22 M.J. 305, 307–08 (C.M.A. 1986). We must be able to determine this to a "degree of certainty." *United States v. Eversole*, 53 M.J. 132, 134 (C.A.A.F. 2000); *see also United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999) (holding we must be able to reach this conclusion "with confidence"). "The standard for reassessment is not what would be imposed at a rehearing but what would have been imposed at the original trial absent the error." *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997); *see*

also United States v. Davis, 48 M.J. 494, 495 (C.A.A.F. 1998) (holding no higher sentence than that which would have been imposed by the trial forum may be affirmed). A reassessed sentence "must be purged of prejudicial error and also must be 'appropriate' for the offense[s] involved" based on our sentence approval obligation under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *Sales*, 22 M.J. at 308.

In determining whether to reassess a sentence or order a rehearing, we consider the totality of the circumstances, including the following illustrative, but not dispositive, factors: (1) dramatic changes in the penalty landscape and exposure, (2) the forum, (3) whether the remaining offenses capture the gravamen of the criminal conduct included within the original offenses, (4) whether significant or aggravating circumstances remain admissible and relevant, and (5) whether the remaining offenses are the type with which we as appellate judges have the experience and familiarity to reliably determine what sentence would have been imposed at trial by the sentencing authority. *Winckelmann*, 73 M.J. at 15–16.

Our modification of the findings did not substantially change Appellant's culpability in this case. Appellant remains convicted of sexual assault against a fellow Airman, two instances of abusive sexual contact against a second Airman, two false statements to investigators, and a battery that resulted in injury. The sentencing landscape has not changed significantly as a result of our decision, which generally weighs in favor of our ability to reassess the sentence.

See United States v. Riley, 58 M.J. 305, 312 (C.A.A.F. 2003); *Winckelman*, 73 M.J. at 14. The remaining sexual misconduct captures the gravamen of the offenses, and the same conduct would have been before the military judge in sentencing. The offenses are of the type that we have experience and familiarity with as appellate judges, and the sentence was imposed by a military judge rather than a panel. Considering the totality of the circumstances of this case, including the factors enumerated in *Winckelmann*, we are confident we can reassess the sentence.

Based on Appellant's conviction for aggravated sexual contact, as well as the offenses of which Appellant remains guilty, the military judge sentenced Appellant to a dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1. In light of the factors discussed above, we conclude that we can reassess the sentence to the sentence adjudged. We are convinced that the military judge in this case imposed sentence based upon the facts and circumstances of the offenses and not the legal label associated with any one offense. We can confidently and reliably determine that, absent the error, the sentence adjudged by the military judge would have been the same.

Conclusion

We find the conviction for aggravated sexual contact alleged in Specification 5, Charge II, factually insufficient and approve the finding of guilt only of the lesser included offense of abusive sexual contact. We

reassess the sentence to the sentence approved by the convening authority. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ. Accordingly, the findings, as modified, and the sentence, as reassessed, are AFFIRMED.

[SEAL] FOR THE COURT

[SIGNATURE]
LEAH M. CALAHAN
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	) ACM 38671 (RECON)))
v.	)) ORDER
Staff Sergeant (E-5) ANDRE K. LEWIS, USAF, Appellant	)))) Special Panel

It is by the Court on this 16th day of May, 2016,

ORDERED:

That the Record of Trial in the above styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review, pursuant to United States Air Force Court of Criminal Appeals Rule 19.2 (d).

The Special Panel in this matter shall be constituted as follows:

ALLRED, MARK, L., Colonel,
Chief Appellate Military Judge
MITCHELL, MARTIN, T., Colonel,
Senior Appellate Military Judge
ZIMMERMAN, LE, T., Colonel,
Appellate Military Judge

[SEAL] FOR THE COURT

[SIGNATURE]
LAQUITTA J. SMITH
Appellate Paralegal Specialist

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	) ACM 38671 (RECON)))
v.	)) ORDER
Staff Sergeant (E-5) ANDRE K. LEWIS, USAF, Appellant	)))) Special Panel

Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, and assault consummated by a battery. On 29 March 2016, this Court issued our opinion, modifying the findings in part and reassessing the sentence. In that opinion, we incorrectly stated Appellant was convicted of adultery, but then correctly stated in footnote 2 of the opinion that Appellant was acquitted of that offense. At all times relevant to our appellate review of Appellant's case, the judges of this Court were cognizant of Appellant's acquittal on the charge of adultery.

On 9 May 2016, pursuant to Rule 19 of this Court's Rules of Practice and Procedure and *United*

States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), Appel-lant moved this court to reconsider our decision.[1] In conjunction with the Motion for Reconsideration, Appellant submitted a Motion to File Appendix to Motion for Reconsideration under Seal and a Motion to Attach Appellant's declaration, dated 24 April 2016. The Government opposed the Motion for Reconsideration.

Accordingly, it is ORDERED this 17th day of May, 2016:

1) Appellant's Motion to Attach is GRANTED.

2) Appellant's Motion to File Appendix to Motion for Reconsideration under Seal is GRANTED. Appellant's declaration will be sealed and any copies in the possession of appellate government counsel may be retained solely for the purpose of fulfilling their appellate responsibilities and subsequently destroyed.

3) Appellant's Motion for Reconsideration is DENIED. Appellant fails to show that any grounds for reconsideration exist. *See United States Air Force Court of Criminal Appeals Rules of Practice and Procedure*, Rule 19.2. *See also United States v. Bethea*, 46 C.M.R. 223, 225 (C.M.A. 1973) (evidence not presented at trial cannot be used to support or reverse a conviction).

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[1] This Court had granted an enlargement of time to Appellant for filing of his motion to reconsider.

4) This Court's opinion, dated 29 March 2016, shall be corrected by striking out the first sentence of the opinion and replacing it with the following language: Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, and assault consummated by a battery, in violation of Articles 107, 120, and 128, 10 U.S.C. §§ 907, 920, and 928.[2]

[SEAL] FOR THE COURT

[SIGNATURE]
LAQUITTA J. SMITH
Appellate Paralegal Specialist

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[2] A corrected copy is attached to this Order.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Andrew K. Lewis, Appellant	USCA Dkt. No. 16-0660/AF Crim.App. No. 38671 ORDER

On further consideration of the granted issue (Daily Journal Dec. 19, 2016), the facts that the United States Air Force Court of Criminal Appeals issued its judgment in Appellant's case on May 17, 2016, and Colonel Martin T. Mitchell was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of United States v. Dalmazzi, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 27th day of December, 2016,

ORDERED:

That the order of December 19, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before
TOZZI, CAMPANELLA, and CELTNIEKS
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist IAN T. MILLER
United States Army, Appellant

ARMY 20150170

Headquarters, United States Army
Maneuver Center of Excellence
Jeffery R. Nance and Charles A. Kuhfahl, Jr.,
Military Judges
Colonel Charles C. Poche, Staff Judge Advocate

For Appellant: Captain Heather L. Tregle, JA; Captain Michael A. Gold, JA.

For Appellee: Lieutenant Colonel A.G. Courie III, JA.

6 May 2016

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

[SIGNATURE]
MALCOLM H. SQUIRES, JR.
Clerk of Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Ian T. Miller, Appellant	USCA Dkt. No. 16-0641/AR Crim.App. No. 20150170 ORDER

On further consideration of the granted issues, __ M.J. __ (Daily Journal Nov. 30, 2016), the facts that the United States Army Court of Criminal Appeals issued its judgment in Appellant's case on May 6, 2016, and Appellate Military Judge Larss G. Celtnieks was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 17th day of January, 2017,

ORDERED:

That the order of November 30, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOSEPH D. MORCHINEK
United States Air Force

ACM S32291

9 May 2016

Sentence adjudged 28 September 2014 by SPCM convened at Bagram Airfield, Afghanistan. Military Judge: Christopher F. Leavey.

Approved Sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $1,021.00 pay per month for 2 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Captain Tyler B. Musselman and Gerald R. Bruce, Esquire.

Before

ALLRED, MITCHELL, and ZIMMERMAN
Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

ZIMMERMAN, Judge:

Appellant was convicted, contrary to his plea, by a panel of officer members of misbehavior before the enemy in violation of Article 99, UCMJ, 10 U.S.C. § 899. Appellant was convicted by the military judge, in accordance with his plea, of use, distribution and possession of hashish while receiving special pay in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court sentenced him to a bad-conduct discharge, confinement for two months, forfeiture of $1,021 pay per month for two months, reduction to the grade of E-1, and a reprimand.[1] The sentence was approved, as adjudged, on 2 February 2015.

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[1] The court-martial order incorrectly states that the sentence was adjudged by the military judge, rather than members. We direct the promulgation of a corrected order. We also note that a reprimand was adjudged and approved, but not included on the convening authority's action, as required by Air Force Instruction 51-201, *Administration of Military Justice* (6 June 2013). Since the omission of the reprimand does not prejudice a material right of Appellant, we direct no further action in that regard. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Appellant argues that: (1) the evidence was factually insufficient to establish that Appellant was "before the enemy" and endangered the safety of Bagram Airfield; (2) that the Government was required to prove that Appellant had a duty to defend Bagram Airfield, and that it failed to do so; (3) the military judge erred in instructing the members prior to deliberation on findings; and (4) the court-martial lacked jurisdiction over the charge of misbehavior before the enemy because it alleged a capital offense yet was referred without consent of the general court-martial convening authority. Finding no error that materially prejudices a substantial right of Appellant, we affirm the findings and sentence.

Background

Appellant used, distributed, and possessed hashish both on and off-duty as a security forces member deployed to Bagram Airfield, Afghanistan. He pled guilty to the controlled substance offenses, but contested the charge that his use constituted misbehavior before the enemy. He argued that under the circumstances, his drug offenses did not endanger the safety of the installation. He further contended that, based upon the state of hostilities, he was not before the enemy at the time of his misconduct. Appellant stipulated that on one occasion he used hashish while posted to a perimeter response team which had immediate-action responsibilities in the event of an attack on the installation. In that capacity, he was the senior member of a three-person crew of a tactical vehicle armed with a crew-served machine gun mounted in a

turret. During that time, he both used hashish and distributed it to the other members of his crew. He also stipulated that on another occasion he used hashish while responsible for the search and inspection of personnel coming onto the installation. His commander testified during the trial that both postings were part of a "defense in depth" strategy to defend the installation. The commander also testified that the installation came under indirect fire attacks during the charged timeframe.

Factual and Legal Sufficiency

Appellant first argues that the evidence was factually insufficient to sustain his conviction for misbehavior before the enemy because the Government failed to prove that his misconduct was actually before the enemy and that it endangered the installation. We review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each

required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

The *Manual for Courts-Martial* provides an explanation for the term "before the enemy."

> Whether a person is "before the enemy" is a question of tactical relation, not distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat may be before the enemy although miles from the enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not a part of a tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy" within the meaning of this article.

Manual for Courts-Martial, United States, pt. IV, ¶ 23.c.(1)(c) (2012 ed.). Our superior court has also examined the issue, holding that "if an organization is in position ready to participate in either an offensive or defensive battle, and, its weapons are capable of delivering fire on the enemy and in turn are so situated that they are within effective range of the enemy weapons, then that unit is before the enemy." *United States v. Sperland*, 5 C.M.R. 89, 91 (C.M.A. 1952).

Appellant contends that "[n]o evidence was presented that Appellant was tactically engaged with the enemy." Neither *Sperland* nor the definition in the *Manual* focuses on individual engagement, however. The *Manual* references, by way of illustration, those before the enemy as a "member of an antiaircraft gun crew" and "a member of a unit about to move into combat." Since one form of misbehavior before the enemy is wrongful failure to engage in combat, we find this unit-based analysis significant. *See United States v. Payne*, 40 C.M.R. 516, 519–20 (A.B.R. 1969). Appellant's commander affirmatively testified that the unit was tactically engaged in the defense of Bagram Airfield. We find Appellant's contention that Bagram Airfield was "some distance from the front or immediate area of combat" unconvincing in light of the uncontested evidence in the record that the installation did, in fact, come under indirect-fire attack during the charged time-frame. Nor are we convinced by Appellant's argument that his misconduct did not actually endanger the base. After making allowances for not having personally observed the witnesses, and based upon our independent review of the record, we are convinced beyond a reasonable doubt that Appellant was before the enemy and that his conduct endangered Bagram Airfield.

Appellant separately argues that, although not explicitly stated in the statute, the specification as alleged incorporated as an element that Appellant had a duty to defend Bagram Airfield. More importantly, Appellant argues that the Government failed to prove

such an element beyond a reasonable doubt. We construe this assignment of error as an assertion that the evidence was factually and legally insufficient to support his conviction because it did not show that Appellant had a duty to defend Bagram Airfield.

We review legal sufficiency of the evidence de novo. *Washington*, 57 M.J. at 399. "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *Turner*, 25 M.J. at 324). The term reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We review the factual sufficiency component of Appellant's assertion using the same standard of review and legal test articulated above.

Appellant first sets out a statutory and due process argument to establish, as an element, that Appellant had a duty to defend Bagram Airfield. We agree with Appellant's interpretation that the specification alleged in this case established an element that Appellant had a duty to defend Bagram Airfield.

We find, however, that the evidence was factually and legally sufficient to show that Appellant had such a duty. Appellant's commander testified both about the general duty of Airmen assigned to his unit and about the specific duties Appellant performed. He testified that all members of his unit had a duty to defend Bagram Airfield. He also testified about the layered defenses he employed, including searches of incoming and outgoing traffic as well as perimeter response teams with additional weapons. Other members of the unit also testified that Airmen assigned to the unit had a duty to defend Bagram Airfield, even during rest periods, or while "off-shift." Appellant also stipulated that he "was assigned to perform base defense duties." More specifically, Appellant stipulated that he used hashish while on-shift assigned to both search duties and perimeter response team duties. We find this evidence was sufficient when viewed in the light most favorable to the prosecution for a reasonable finder of fact to conclude that Appellant had a duty to defend Bagram Airfield at all times relevant to the charged offense. We ourselves, after making allowances for not having personally observed the witnesses, and based upon our independent review of the record, also conclude beyond a reasonable doubt that Appellant was guilty of the offense alleged.

Reasonable Doubt Instruction

Appellant also argues that the military judge erred in instructing the members prior to deliberation on findings, particularly as it relates to reasonable

doubt. We review de novo the military judge's instructions to ensure that they correctly address the issues raised by the evidence. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996). When, as in this case, trial defense counsel made no challenge to the instruction now contested on appeal, the matter has been forfeited absent plain error.[2] *See* Rule for Courts-Martial (R.C.M.) 920(f). If we find error, we must then determine whether the error was harmless beyond a rea-sonable doubt. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011).

The language used by the military judge in Appellant's case is—and has been for many years—an accepted reasonable doubt instruction used in Air Force courts-martial. *See, e.g., United States v. Sanchez*, 50 M.J. 506, 509–10 (A.F. Ct. Crim. App. 1999); *see also United States v. Gibson*, 726 F.2d 869, 873–74 (1st Cir. 1984) (upholding similar language). It was also offered by our superior court as a suggested instruction. *See United States v. Meeks*, 41 M.J. 150, 157–58 n.2 (C.M.A. 1994) (citing Federal Judicial Center, Pattern Criminal Jury Instruction 17–18 (1987)). As such, we cannot say the military judge committed error, plain or otherwise, in giving the challenged instruction in Appellant's case.

Jurisdiction over Capital Offense

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[2] Although we recognize that the rule speaks of "waiver," this is in fact forfeiture. *United States. v. Sousa*, 72 M.J. 643 (A.F. Ct. Crim. App. 2013).

Appellant raises for the first time on appeal that the convening authority who referred his case to a special court-martial lacked the consent of the general court-martial convening authority, thereby depriving the court of jurisdiction to hear the case. *See* R.C.M. 201(f)(2)(C); *United States v. Henderson*, 59 M.J. 350, 353 (C.A.A.F. 2004). We disagree with Appellant's contention.

"The jurisdiction of a special court-martial over a non-mandatory capital offense is a legal question we review de novo." *Henderson*, 59 M.J. at 351–52.

"Misbehavior before the enemy" under Article 99, UCMJ, is a non-mandatory capital offense, punishable by "[d]eath or such other punishments as a court-martial may direct." *Manual for Courts-Martial, United States*, pt. IV, ¶ 23.e. (2012 ed.). When read to-gether, Article 19, UCMJ, and R.C.M. 201(f)(2)(C)(ii)[3] allow a special court-martial convening authority (SPCMCA) to refer a non-mandatory capital offense to trial by special court-martial, when permitted by "[a]n officer exercising general court-martial jurisdiction over the command which includes the accused." Appellant did not raise this jurisdictional issue at trial, and the record of trial is devoid of any indication that the general court-martial convening authority (GCMCA) granted authority to the convening authority. Hence, the Government filed affidavits in support

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[3] Although we recognize that the rule speaks of "waiver," this is in fact forfeiture. *United States. v. Sousa*, 72 M.J. 643 (A.F. Ct. Crim. App. 2013).

of its argument that the convening authority actually exercised proper jurisdiction under the R.C.M. 201(f)(2)(C)(ii) exception, which affidavits were not contested by Appellant.[4]

The Government supplied an affidavit from the GCMCA and one from the SPCMCA who convened this court-martial. Both affiants unequivocally attested to discussing this case with one another on multiple occasions, and to the GCMCA's granting of approval to the SPCMCA to refer the Article 99 offense to a special court-martial. We find the statements in the affidavits were relevant; the GCMCA granted permission to the convening authority to refer the offenses to trial by a special court-martial; and therefore, the special court-martial had jurisdiction to convict and sentence Appellant.[5]

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[4] The Government filed a motion to attach documents with its response to Appellant's supplemental filings, which motion was uncontested and granted by this court. We considered the affidavits in our review of Appellant's claim of jurisdictional error. *See United States v. Ginn*, 47 M.J. 236, 242 (C.A.A.F. 1997); *United States v. Averell*, 2014 CCA LEXIS 841 (N.M. Ct .Crim. App. 6 November 2014), *pet. rev. denied*, 74 M.J. 354 (C.A.A.F. 2015) (where appellant did not raise jurisdictional issue at trial and did not dispute contents of post-trial affidavit, court relied on post-trial affidavit to find proper referral of charges to court-martial).

[5] Although neither required by law nor regulation, where the GCMCA permits a non-mandatory

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are AFFIRMED.

[SEAL] FOR THE COURT

[SIGNATURE]
LEAH M. CALAHAN
Clerk of the Court

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capital offense to be referred to a special court-martial, such approval could be expressly stated on the charge sheet, DD Form 458, Section V.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Joseph D. Morchinek, Appellant	USCA Dkt. No. 16-0671/AF Crim.App. No. S32291 ORDER

On further consideration of the granted issue (Daily Journal Oct. 18, 2016), the facts that the United States Air Force Court of Criminal Appeals issued its judgment in Appellant's case on May 9, 2016, and Colonel Martin T. Mitchell was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 27th day of December, 2016,

ORDERED:

That the order of October 18, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES
v.
Airman First Class
KELVIN I. L. O'SHAUGHNESSY
United States Air Force

ACM 38732

5 May 2016

Sentence adjudged 21 August 2014 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Gregory O. Friedland (arraignment) and Vance H. Spath.

Approved Sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Colonel Katherine E. Oler; Captain Tyler B. Musselman; and Gerald R. Bruce, Esquire.

Before
MITCHELL, MAYBERRY, and BROWN
Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

MAYBERRY, Judge:

At a general court-martial composed of officer and enlisted members Appellant was convicted, contrary to his pleas, of one charge and one specification each of sexual assault and abusive sexual contact, in violation of Article 120 UCMJ, 10 U.S.C. § 920. Appellant was acquitted of one specification of abusive sexual contact. The court sentenced Appellant to a bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged but deferred the adjudged forfeitures from 14 days after sentence was announced until action.

On appeal, Appellant contends that the mental health records of RS, Appellate Exhibit VII, are incomplete thereby render the record of trial incomplete. Accordingly, Appellant asserts that he was denied due process under the Fifth Amendment[1] when this court failed to examine the entire record of trial and that he was further denied due process under the Fifth Amendment due to appellate counsel's inability

[1] U.S. CONST. amend. V.

to review the complete mental health records, resulting in counsel's inability to provide effective assistance of counsel. We disagree and affirm the findings and sentence.

Prior to filing his assignment of errors, Appellant moved this court to compel the production of "the entirety of the mental health records for Ms. RS." Appellant asserted that the presence of an arrow in the margins of one page of the records contained in the mental health records "indicates there is more information contained on the back side or additional pages." Appellant's position is that facially it appears the mental health records as provided to the Government, and eventually the military judge, were incomplete. Appellant maintained that the incomplete record prohibited his counsel from determining whether there was some prejudice or harm to Appellant and this court was unable to conduct its review pursuant to Article 66, UCMJ.

This court denied the motion to compel, applying the four-prong standard for post-trial discovery set out in *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). This court held that Appellant had failed to meet his threshold burden of demonstrating some measure of appellate inquiry was warranted in this matter. First, he had not demonstrated that the claimed "additional" records exist. Appellate Exhibit VII was reviewed in camera by the military judge at trial, and later provided to both trial and trial defense

counsel. Additionally, their respective expert consultants were authorized to review the documents. RS was interviewed by trial defense counsel and testified in findings and sentencing but there was no showing that trial defense counsel inquired about the handwritten arrow or questioned the completeness of the record at trial. Finally, since Appellant had not filed an assignment of errors at the time of his motion, he had not provided a sufficient showing of relevance to a claim of error or defense and this court was unable to determine whether there was a reasonable probability that the result of the proceeding would have been different if this information had been disclosed (assuming it exists). Additional facts necessary to resolve this issue are discussed below.

The sole error now claimed by Appellant is that the record of trial is incomplete as a result of the existence of this extraneous mark contained on one page of the sealed mental health records. Appellant's requested relief is that either the conviction be set aside or the bad-conduct discharge be disapproved.

Record of Trial—Is it Complete?

The issues of whether a record of trial is complete and a transcript is verbatim are questions of law that we review de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014). The lack of a verbatim transcript and an incomplete record are two separate and distinct errors. *United States v. Gaskins*, 72 M.J. 225, 230 (C.A.A.F. 2013).

We first address the issue of whether the transcript is verbatim; it is. Article 54(c)(1), UCMJ, 10 U.S.C. § 854(c)(1), requires a "complete" record of the proceedings and testimony to be prepared for any general court-martial resulting in a punitive discharge. A "complete" record must include the exhibits that were received in evidence, along with any appellate exhibits. Rule for Courts-Martial (R.C.M.) 1103(b)(2)(D)(v). The "missing" appellate exhibit page(s) solely raise the issue of whether the record is complete. The threshold question is whether the missing exhibits are substantial, either qualitatively or quantitatively. *Davenport*, 73 M.J. at 377. Omissions may be quantitatively insubstantial when in light of the entire record the omission is "so unimportant and so uninfluential . . . that it approaches nothingness." *Id.* (quoting *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953)).

Where a record is missing an exhibit, this court evaluates whether the omission is substantial. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id.* Whether an omission is insubstantial is a "case-by-case," fact based inquiry." *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). If the omission is substantial, thereby raising a presumption of prejudice, the Government may rebut the presumption by reconstructing the missing material. *United States v. Lovely*, 73 M.J. 658, 676 (A.F. Ct. Crim. App. 2014).

Based upon the evidence in the record of trial, Appellate Exhibit VII includes every page provided to the military judge for his in camera review. We note that the record of trial is silent as to the number of pages provided to the judge.[2] We also note that the mental health records were not sealed at the time they were provided to the military judge. However, there was no objection or comment of any kind made by any party when this fact was announced in open court by the Special Victim's Counsel (SVC). Additionally, while the trial counsel indicated on the record that they had procured the mental health records, it was the SVC who provided them to the military judge, stating on the record that his client had them in her possession. The military judge took possession of the documents and indicated that he would "identify page numbers later." After his in camera review of the documents, the military judge held that there was nothing material or necessary to the defense and did not provide the records to either party; they remained sealed. The military judge forewarned the SVC that if there was victim impact evidence presented during the sentencing phase, assuming there was a sentencing phase, this issue would likely resurface. The SVC

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[2] The only estimate as to the number of pages is offered by the trial counsel during the closed hearing on the Defense Motion to Compel Mil. R. Evid. 513 records. Trial counsel indicates that the records have been secured, and indicates the number of pages is "bordering [on] maybe 100 or so."

acknowledged that possibility and advised that he had discussed it with his client.

In the sentencing phase of the trial, the SVC requested that RS be allowed to make an unsworn statement. Again, the military judge discussed the possibility of this allowing access by counsel to the mental health records. The record of trial references that over the evening recess, the military judge decided to provide access to the mental health records and sent an email to the parties notifying them of his decision. On the record the next day the military judge states "both sides have a copy."[3] RS provided an unsworn state-ment to the court. In rebuttal, the defense offered a single page from those records as Defense Exhibit R, without objection from the SVC or the Government. This document was admitted and sealed. The page of-fered was neither the page containing the arrow, nor the other pages of the mental health records contain-ing information on this same subject matter.[4] The Government did not ~~call RS or offer any surre~~buttal.

[3] The record of trial does not contain the email, and the transcript contains no additional explanation as to how the sealed matters were provided to the counsel. We consider this to be analogous to a Rule for Courts-Martial 802 session and remind military judges and counsel that such matters should be included in the record orally or in writing.

[4] To avoid unnecessarily disclosing the content of privileged mental health records, this court deliberately confines our description of the narrative on that

The record of trial contains no further discussion regarding the content of the mental health records in Appellate Exhibit VII. The Master Index for the record of trial does not indicate the number of pages contained in Appellate Exhibit VII, nor does the cover sheet of the envelope containing the exhibit. The only quantitative description of the records was by the trial counsel, when he opined that they bordered on 100 pages. There are in fact 12 pages. However, in so far as the mental health records were in the possession of the SVC and trial counsel had not seen them, his assessment can best be characterized as an estimate designed to guide the military judge's decision as to how long it would take him to review the material.

Appellate Exhibit VII contains a "Release of Confidential Information Authorization Form" signed by RS on 12 August 2014, authorizing release of the entire contents of her mental health records to her SVC. There is no evidence before us to support that the mental health records provided to the military judge differ in any way from the documents contained in Appellate Exhibit VII. Both Appellant's counsel and this court have access to the entire original record of trial. The record of trial in this case is complete.

Assuming arguendo the presence of an arrow in the margin signifies that additional pages of mental

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page to be administrative in nature. Furthermore, the same subject matter is present on two other pages.

health records exist, this court must determine whether the omission is substantial. *Lovely*, 73 M.J. at 676. These records only affect the sentencing phase of the trial because they only became relevant after RS provided victim impact evidence. Appellant subsequently offered a portion of one page of the records. Having examined the contents of the page with the arrow, even if that arrow refers to additional matters found on the back of the same page or an additional page, we are convinced those matters would be insubstantial with respect to sentencing. We find that if additional records exist related to the subject matter proximate to the arrow, their omission is insubstantial. In this case the omission was insubstantial both qualitatively, because the substance of the omitted testimony presumably relates directly to the subject matter proximate to the arrow, and quantitatively, since the subject matter is addressed in other portions of the mental health records. That information is not relevant to the subject matter of RS's victim impact evidence.

Finally, we reevaluate the propriety of post-trial discovery using the Campbell factors. *Campbell*, 57 M.J. at 138. Our assessment is unchanged regarding the factors that Appellant has not made a colorable showing that the evidence exists or that the evidence, if it exists, was discoverable at the time of trial had the trial defense counsel raised the issue with the military judge, the individual who provided the copies, or RS herself. Given that Appellant has not asserted any error other than the speculation that the record of

trial is incomplete, this court finds that any potential additional information is not relevant to an articulated claim or defense and there is no reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

The record of trial is complete. Appellant's counsel had the benefit of reviewing the entire record of trial and was able to provide effective assistance. We are able to conduct a thorough and detailed appellate review of this case and have done so.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are AFFIRMED.

[SEAL] FOR THE COURT

[SIGNATURE]
LEAH M. CALAHAN
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Kelvin L. O'Shaughnessy, Appellant	USCA Dkt. No. 16-0616/AF Crim.App. No. 38732 ORDER

On further consideration of the granted issue (Daily Journal Nov. 29, 2016), the facts that the United States Air Force Court of Criminal Appeals issued its judgment in Appellant's case on May 5, 2016, and Colonel Martin T. Mitchell was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of United States v. Dalmazzi, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 27th day of December, 2016,

ORDERED:

That the order of November 29, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Keanu D.W. Ortiz, Appellant	USCA Dkt. No. 16-0671/AF Crim.App. No. 38839 ORDER AND JUDGEMENT

On consideration of the briefs of the parties, the briefs of *amici curiae,* and oral argument, it is, by the Court, this 9th day of February, 2017,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed. The opinion of the Court will be issued on a future date. C.A.A.F. R. 43(b). A petition for reconsideration may be filed no later than 10 days after the date of the issuance of said opinion.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Charles D. Buford, Appellant	USCA Dkt. No. 16-0689/AF Crim.App. No. 2016-04 ORDER

On further consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals on appeal by the United States under Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862, and the granted specified issue, it is noted that the court below has neither affirmed nor reversed the ruling of the military judge and instead has vacated the ruling at the court-martial and remanded the case to the military judge. There is, at present, no extant ruling which excludes evidence, and if the ruling below is effectuated, the judgment of the Court of Criminal Appeals would resume, not terminate, the proceedings. Additionally, the granted assigned issues are without merit in view of our holding in *United States v. Ortiz*, __ M.J. __ (C.A.A.F. 2017). Accordingly, it is, by the Court, this 13th day of February, 2017,

ORDERED:

That the order granting the petition for grant of review is hereby vacated and the case is returned to

the Judge Advocate General of the Air Force for execution of the remand and further consideration ordered by the Court of Criminal Appeals in accordance with *United States v. Kosek*, 41 M.J. 60, 64-65 (C.M.A. 1994).

For the Court,
/s/ William A. DeCicco
Clerk of the Court